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Constitutional Law, Compulsory Vaccination

The Supreme Court of Errors of Connecticut has recently decided (1) That the act of that state, (Gen. Stat. Conn., § 2137), which provides that the board of school visitors of any town may require that every child shall be vaccinated before being permitted to attend the public schools, is not in conflict with Art. I., § 1, of the constitution of Connecticut, providing for equality of rights, or with the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of any rights without due process of law, or deny to him the equal protection of the law; and (2) That under Gen. Stat. Conn., §§ 2137, 2197, prescribing the powers and duties of school visitors, and empowering them to impose vaccination as one of the conditions of attending the public schools, the school committee of a town has authority to pass a vote that every pupil attending the public schools shall, at the beginning of the school term, present evidence of vaccination before he shall be allowed to attend school, and that after the spring term of that year all pupils not vaccinated shall be excluded, although there was at the

time no case of small-pox in the town, and no epidemic threatened: *Bissell* v. *Davison*, 32 Atl. Rep. 348.

An act which provides for the vaccination of all children attending the public schools, and for the exclusion of unvaccinated children therefrom, is sufficiently general in its scope, and is a constitutional exercise of the police power of the legislature: *Abeel* v. *Clark*, 84 Cal. 226; S. C., 24 Pac. Rep. 383. So, a regulation of the school board, which excludes pupils who will not undergo vaccination during the prevalence of an alarm over the report that there is a case of small-pox in the city, is not unreasonable. In *Duffield* v. *School District of Williamsport*, 162 Pa. 476; S. C., 29 Atl. Rep. 742, 34 W. N. C. 525, the councils of the city of Williamsport had passed an ordinance in 1872, providing that no pupil "shall be permitted to attend any public or private school in said city, without a certificate of a practising physician that such pupil has been subjected to the process of vaccination." On the occasion of a small-pox scare, the board of health of the city sent a communication to the school authorities, requesting them to take action to the effect "that no pupil shall attend the schools of this city except they be vaccinated or furnish a certificate from a physician that such vaccination has been performed." The school board accordingly adopted a resolution in conformity with the recommendation of the board of health, and the plaintiff's son, having neglected to comply with this resolution, was refused admittance to the public schools. The plaintiff thereupon brought suit for a mandamus to compel the school board to admit him; but the application was denied, and the denial was affirmed by the Supreme Court, which held that the regulation was a reasonable one; that whether or not vaccination is an efficient preventive of disease is not a question for the courts; and that as there is a difference of opinion on the subject among medical authorities, a school board must decide in the exercise of its discretion whether it will or will not, for the protection of the children under its care, exclude unvaccinated children from the school, and this discretion will not be interfered with by the courts.

The Supreme Court of Florida, in *Bloxham* v. *Florida Cent. & F. R. R. Co.*, 17 So. Rep. 902, has lately held, that a suit in equity by a railroad company against the state officers charged with the collection of taxes, praying that its lines be declared exempt from taxation under the laws of the state, that the said officers be restrained from selling any portion of its property for default in payment of taxes previously assessed, and that they be ordered to repay to the plaintiff all moneys theretofore improperly collected on account of said assessments of taxes, is, as to the last prayer for relief, to all intents and purposes a suit against the state for the recovery of money, and a judgment or decree against the officers named as defendants would be a judgment or decree against the state; and that that branch of the suit should be dismissed for want of jurisdiction.

Suit against State

A suit to enjoin a state officer from assessing or enforcing a tax for which there is no authority or warrant under the state laws is not in substance a suit against the state, within the prohibition of the eleventh amendment: *Sanford* v. *Gregg*, 58 Fed. Rep. 620. So, also, a suit against the railroad commissioners of a state, to restrain the enforcement of their regulations, as unjust and unreasonable, is not, if the state has no pecuniary interest involved, within the eleventh amendment: *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; S. C., 14 Sup. Ct. Rep. 1047; *Clyde* v. *Richmond & D. R. Co.*, 57 Fed. Rep. 436. A suit in equity against the board of land commissioners of a state, brought by a purchaser of lands under a statute of that state, in order to restrain the defendants from doing acts which the bill alleges are in violation of the plaintiff's contract with the state when he purchased the lands, and which are unconstitutional, destructive of the plaintiff's rights and privileges, and which it is alleged will work irreparable damage and mischief to his property rights so acquired, is not a suit against the state: *Pennoyer* v. *McConnaughy*, 140 U. S. 1; S. C., 11 Sup. Ct. Rep. 699, affirming 43 Fed. Rep. 196, 338; S. C., 14 Sawy. 584.

When a corporation, engaged in interstate commence, is prosecuted by a state board of officers for failure to comply

with the statutory regulations imposed by the state, the federal courts may restrain the proceedings, although they were commenced in the name of the state; for the injunction will go against the board at whose instance the proceedings were had, and not against the state: *State of Louisiana* v. *Lagarde*, 60 Fed. Rep. 186.

When the federal courts have ordered a state officer who has seized property belonging to a corporation in the hands of a receiver, in an attempt to collect a tax alleged by the receiver to be illegal, and attacked by him by proceedings in the federal courts, the officer is guilty of contempt; and a proceeding against him for that contempt is in no sense a suit against the state: *In re Tyler*, 149 U. S. 164, 191; S. C., 13 Sup. Ct. Rep. 785, 793.

When the statute incorporating a board of state officers provides that the board "may sue and be sued," this is a sufficient consent of the state that the board may be sued; and it is not necessary to obtain an express consent before bringing an action against it: *Granville Co. Bd. of Education* v. *State Bd. of Education*, 106 N. C. 81; S. C., 10 S. E. Rep. 1002.

On the other hand, a state cannot be sued to recover the amount due to holders of its bonds: *Hans* v. *Louisiana*, 134 U. S. 1; S. C., 10 Sup. Ct. Rep. 504, affirming 24 Fed. Rep. 55; nor can a suit be maintained against the auditor of a state, to compel the levying of a special tax for the benefit of holders of its bonds, since that is in effect a suit against the state: *North Carolina* v. *Temple*, 134 U. S. 22; S. C., 10 Sup. Ct. Rep. 509.

Since the board of agriculture is a department of the state government, if the state has not given its consent to be sued through it, an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained: *Lord & Polk Chemical Co.* v. *Board of Agriculture*, 111 N. C. 135; S. C., 15 S. E. Rep. 1032. So, too, a private citizen cannot bring a suit against a state board to enjoin the erection of a public building at a place other than that prescribed by law, unless his burden of taxation will be increased thereby: *Sherman* v. *Bellows*, (Oreg.) 34 Pac. Rep. 549.

The act of Congress of 1890, granting money in aid of agricultural colleges established by the states, (26 Stat. at Large, 417,) imparts a grant to the state, as a political body, of a fund to be administered by the state; and, therefore, the federal courts have no jurisdiction to determine the rights of conflicting claimants to the fund, by a suit to restrain the state treasurer from paying the money to one of them, for that is, in effect, a suit against the state: *Brown University* v. *Rhode Island College of Agriculture & Mechanic Arts*, 56 Fed. Rep. 55.

When a state has brought a suit in equity against a defendant in one of her own courts, and the cause had been removed to the federal courts, the defendant may there file a cross-bill against the state, as she has voluntarily submitted herself to the jurisdiction, and the cross-bill is not an original suit: *Port Royal & A. Ry. Co.* v. *State of South Carolina*, 60 Fed. Rep. 552. But a cross-bill cannot be filed against a state, under a constitutional provision, (Const. Ala. Art. 1, § 15,) that the state shall not be made a defendant in any court of law or equity, if it seeks affirmative relief against the state: *Holmes* v. *State*, (Ala.) 14 So. Rep. 51. Nor can a cross-demand be maintained against a state: *State* v. *Gaines*, (La.) 15 So. Rep. 174.

Contract, Construction, Price of Gas

According to the Supreme Court of Ohio, a contract which binds a gas company to furnish to a city "such quantity of gas as may be required by the city council for public lamps at two-thirds of the lowest averaged price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburgh," means that the price of the gas shall be ascertained by taking the lowest cash price in each city, adding these prices together, dividing the amount by five, and then taking two-thirds of the quotient. This last result will be the price to be paid by the city to the gas company under the contract: *City of Cincinnati* v. *Cincinnati Gaslight & Coke Co.*, 41 N. E. Rep. 239.

Corporations, Consolidation, Taxation

When a new corporation is formed by the consolidation of two or more other corporations, and no provision is made by statute or by the articles of incorporation for the payment of the debts and liabilities of the constituent corporations, the new corporation assumes all the debts and liabilities of the constituent companies, which follow as an incident of the consolidation; and, under such circumstances, such consolidated corporation is not an innocent purchaser for value of the property of its constituent companies, so as to prevent the state from subjecting the same to the payment of taxes thereon: *Bloxham* v. *Florida Cent. & P. R. R. Co.*, (Supreme Court of Florida,) 17 So. Rep. 902.

Courts, Ratio Decidendi

The courts cannot be influenced in their action by objections which do not apply to the constitutionality, but only to the policy, the justice, and the wisdom of the law in question. The relief from such legislation, if the objections urged are well taken, must come from the legislative, and not the judicial, department of the government. The courts are bound to uphold the statutes, unless they are clearly in conflict with the constitution: *Bloxham* v. *Florida Cent. & P. R. R. Co.*, (Supreme Court of Florida,) 17 So. Rep. 902.

This may well be commended to some courts, which act as if their prejudices were the only criteria of the propriety of a statute, and whose contortions in the effort to get an unconstitutional view of a case would be ridiculous, if the effects were not so disastrous.

Criminal Law, Betting, Social Club

The Queen's Bench Division has lately rendered a very interesting decision in regard to the liability of the members of a social club under police regulations. The respondent was charged with an offence against the Betting Act of 1853, (16 & 17 Vict. c. 119, § 1,) which enacts that "no house, office, room, or other place shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . . . betting with persons resorting thereto." The

premises in question were owned and occupied by a club, registered under the Companies' Acts. By the rules, each member was required to hold at least one share, and disputes as to bets were settled by a committee. Refreshments and dinners were served in the club, and newspapers provided. Members were in the habit of betting with each other in the club-room, which was used exclusively by members, but no member had any particular place allotted to him. The respondent, who was a member, made bets on the club premises with other members. On these facts, it was held that he was not guilty of an offence against the act: *Downes* v. *Johnson*, [1895] 2 Q. B. 203.

Erroneous Sentence, Effect of Reversal

According to a recent decision of Judge PHILIPS, of the District Court for the District of Kansas, First Division, when a sentence different from that authorized by law has been imposed on a defendant convicted of a criminal offence, and the judgment has been reversed for that error, and the cause remanded to the trial court, with instructions to proceed therein according to law, the trial court resumes jurisdiction of the cause at the point where the error supervened, and has authority to resentence the defendant, and impose the penalty provided by law, although part of the void sentence has been executed: *U. S.* v. *Harman*, 68 Fed. Rep. 472.

Erroneous Sentence, Effect of Reversal, Autrefois Convict

But the same judge has also held, in *United States* v. *Woodruff*, 68 Fed. Rep. 536, that when a defendant was convicted of embezzling moneys received by him as assistant postmaster, and by consent of the district attorney, in view of the insolvency of the defendant, a verdict was taken upon the issue of embezzlement alone, without any finding of the amount embezzled, and the court sentenced the defendant to imprisonment only, without rendering judgment, by way of fine, for the amount embezzled, for which error the judgment was reversed and the cause remanded for further proceedings according to law, the trial court was without authority to fix the amount of the fine without the verdict of a jury, and as the opinion of the appellate court established the fact that the

two issues were inseparable, and must be tried together, the defendant having been once in jeopardy on the issue of the amount embezzled, must be discharged.

Dynamite Explosion, Evidence, Estoppel

The Supreme Court of California has lately ruled, in *Judson* v. *Giant Powder Co.*, 40 Pac. Rep. 1020, that a presumption of negligence arises from the fact that an explosion has occurred in a dynamite factory, when there is evidence that dynamite, if carefully handled, will not explode, and expert evidence is admissible to establish the latter fact; and the fact that a person sold the land adjoining his own for a dynamite factory will not preclude him, on the maxim "*volenti non fit injuria*," from suing for injuries to his own land and the improvements thereon, resulting from the negligent handling of an explosive necessary for the manufacture of dynamite.

Election, Acceptance or Rejection of Trust

When a fund is deposited with a trustee to pay a creditor, who is free to accept or reject the benefit of the trust, the fact that he prosecutes a pending suit against the debtor to judgment, with full knowledge of all the circumstances, shows an election to reject the trust: *White* v. *White*, (Supreme Court of Alabama,) 18 So. Rep. 3.

Elections, Ballots

The disputes as to the validity of ballots under the Australian Ballot Laws still continue. The Ballot Act of Wyoming, (Acts 1890, c. 80,) provides, in § 110, that the county clerk shall furnish a stamp with an ink pad to the judges of election for the purpose of stamping the official ballots; § 119 provides that the judge who delivers the ballot to an elector shall first mark it with this stamp, and write his name or initials upon the back of each ballot, directly under the official stamp; § 122 requires the elector to fold the ballot so that the face will be concealed, and the indorsement may be seen; and § 130 provides that "in the canvass of the votes any ballot which is not indorsed by the official stamp or has not the name or initials of the judge of election as

provided in this act shall be void and shall not be counted." This last provision was held, in *Slaymaker* v. *Phillips*, 40 Pac. Rep. 971, by the Supreme Court of Wyoming, against the dissent of Chief Justice GROESBECK, to mean that both the official stamp and the name or initials of the judge of election must appear on the ballot, and further, that they must appear upon the exterior of the ballot when folded so as to conceal its face. The court also held, with the same dissent, that this act was in full conformity with the constitution of Wyoming, Art. 6, §§ 1 & 2, giving to certain citizens, not falling within any of the classes excluded, the right to vote; with § 11, which provides for elections by a secret ballot, and enacts that only the official ballots shall be received and counted; and with § 13, which imposes upon the legislature the duty of passing laws to secure the purity of elections.

Husband and Wife, Separate Property, Restraint on Anticipation, Execution.

According to a recent decision of the Court of Appeal of England, when a married woman has separate property subject to a restraint on anticipation, the restraint applies to income which has become due, but has not yet been paid to her; and therefore such income cannot be made available in execution upon a judgment against her, even although it had accrued due at the date of the judgment: *Loftus* v. *Heriot*, [1895] 2 Q. B. 212.

Injunction Against State Officer, Restraining Disposition of Public Funds.

The Supreme Court of South Carolina, in *Butler* v. *Ellerbe*, 22 S. E. Rep. 425, has neatly evaded the question as to the constitutionality of the Registration acts of that state, one of which, passed in 1882, (Gen. Stat. 1882, § 90, &c.,) provided that in 1882 a registration of voters should be made, and the registration books closed; that thereafter such books should be open once a month after the general election in each year, until the first of July preceding each general election, (usually held in November,) for the registration of persons thereafter becoming entitled to vote; that, after the closing of the books in each year, persons coming of age before the election might be

registered; and that, upon the registration of any voter, a certificate of registration should be given him, without the production of which he should not be allowed to vote, and which, upon removal from one county to another, must be transferred and renewed under onerous conditions; the other of which statutes, passed in 1894, providing for the election of members of a constitutional convention, also provided that a person not registered in 1882, or at a subsequent time when he would have a right to register, might register within a certain time, upon making affidavit, supported by that of two respectable citizens, as to various particulars of his occupation and residence at the time he might have registered and thereafter. It was attempted to raise the question by a proceeding to restrain the comptroller-general and treasurer of the state from disbursing funds for the payment of the officers under those acts, on the ground that they were unconstitutional, and that the payment of the said funds was therefore unlawful, and would cause an irreparable injury to the petitioner, a citizen and resident taxpayer of the state. But the majority of the court cleverly dodged this issue, although on different grounds. Mr. Justice GARY held that the proceeding was in effect a suit against the state, to which the state was an indispensable party, and which therefore could not be maintained without its consent. But with this view both Chief Justice McIVER and Justice POPE differed. Justices GARY and POPE, however, agreed, against the dissent of Chief Justice McIVER, that the action could not be maintained, the former holding (1) That the proceeding did not necessarily involve the determination of the constitutionality of the registration act, and therefore that question could not properly be passed upon, and (2) That an injunction would not lie to restrain the state officers from paying the salaries in question, on the ground of the unconstitutionality of the registration act, because the state, if it could be sued, would be estopped from interposing the objection that the services rendered at her instance and for her benefit were illegal: Justice POPE maintaining (1) That a petition for an injunction to restrain state officers from disbursing public funds pursuant to an act

of the legislature appropriating moneys for the payment of salaries to the supervisors of registration and other election officers appointed under the registration act, on the ground that that act was an unconstitutional abridgment of the elective franchise, but which fails to allege that any one has been deprived of his right to vote by reason of said act, presents a purely abstract proposition of law, which it is not the duty of a court of equity to decide; and (2) That such an injunction would not lie, because the petitioner had an adequate remedy at law. From all these propositions, Chief Justice McIver dissented, holding, and rightly, (1) That an injunction will lie at the suit of a taxpayer to enjoin the illegal disposition of state funds arising from taxation; (2) That one who has been elected to office by the general assembly, whose members were elected under the registration act, is not estopped to institute an action, as a taxpayer, assailing the constitutionality of that act; (3) That when the purport and effect of a registration law is to add to or take away any of the qualifications prescribed by the constitution, or when its effect is to obstruct, subvert, or even unnecessarily to impede the exercise of the right conferred by the constitution, it cannot be sustained, but must be held an unconstitutional invasion of the right of suffrage; (4) That the Registration Act of South Carolina of 1882, (Gen. Stat. S. Car. 1882, tit. 2, c. 7; Rev. Stat. S. Car. 1893, tit. 2, c. 8) is an unconstitutional limitation of the right of suffrage; and (5) That the petitioner has no adequate remedy at law.

These acts, however, have been held unconstitutional by the United States Circuit Court, in *Mills* v. *Green*, 67 Fed. Rep. 818. See 2 Am. L. Reg. & Rev. (N. S.), 486.

Insurance, Accident, Total Loss

The Supreme Court of New York, Fifth Department, in *Sneck* v. *Travellers' Ins. Co., of Hartford*, 34 N. Y. Suppl., 545, has overruled its former decision in the same case, 30 N. Y. Suppl. 881, and now holds that in an action on an accident insurance policy, when the plaintiff's surgeon testified that the fingers and the head of all

the metacarpal lines of the injured hand were cut off, that a little over half the hand, anatomically speaking, was gone, that thirteen of the twenty-seven bones of the hand were entirely gone, and parts of five more, and that the portion of the hand remaining was more useful than if the amputation had been at the wrist, but that he had no use of it as a hand; and the plaintiff, who on the first trial testified that he could use the injured hand for certain purposes, testified on the second trial that he had no use of the injured member as a hand, and explained his testimony on the former trial by stating that he meant that he had the use of the whole arm, not the use of the hand;—that on such evidence the plaintiff had lost his entire hand, within the meaning of the policy. See 2 AM. L. REG. & REV. (N. S.) 86.

Fidelity Insurance

The nature of the bond of indemnity given by a fidelity insurance company to ensure the proper performance of the duties of an officer in a position of trust, has recently been very fully examined by the Circuit Court for the Middle District of Tennessee, in *Mechanics' Savings Bank & Trust Co.* v. *Guarantee Co. of North America*, 68 Fed. Rep. 459. Such a bond, the court holds, is analogous to an ordinary policy of insurance, and is governed by the same principles of interpretation; and accordingly (1) When a bond issued by a fidelity insurance company provides that the answers made by the employer to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they were "knowingly false;" (2) When, in an application to a fidelity insurance company for a cashier's bond, the bank in answer to a question, stated that there had never been a default in the position of cashier, a controversy between the bank and a former cashier about certain commissions made by the latter, which he thought was an individual matter, while the bank thought he should account for it, as his time was paid for by the bank, was not a default within the terms of the contract; (3) That a printed condition in a bank teller's bond issued by a fidelity insurance company, requiring

inspection of his accounts at least once a year, is satisfied by a quarterly examination required by the contract as actually agreed on and written out at the time of executing the bond; (4) That when a bank teller's bond issued by a fidelity insurance company required the bank to "observe all due and customary supervision over said employe for the prevention of default, and the only supervision expressly agreed on was a quarterly examination of the books and accounts as regularly made by the bank on its own account, and a report of any known speculations on the part of the teller, an examination in good faith, such as was customary, and such as the committee appointed deemed sufficient for the protection of the bank and its stockholders, was sufficient to satisfy the requirement of the bond, though it was somewhat loose and careless; and (5) That when a bank teller's bond required the bank, on becoming aware of the employe being engaged in speculation, to report the fact to the surety, and the bank hearing of speculation by the teller, on investigation found that he had once contributed two hundred dollars toward the formation of a brokerage association, but, becoming dissatisfied, had sold out, the failure to disclose the result of the inquiry would not, in the absence of bad faith, invalidate the bond.

When a bond of indemnity recited that the association of which the officer was treasurer had delivered to the surety company certain statements relative to the duties and accounts of the treasurer, which it was agreed should form the basis of the contract in it, it was held that if such statements involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed; nor by conversations as to laws of the association with its vice-president, at the time of application for the bond, as it did not appear that he had authority to make any representations on the subject; nor by the fact that at the time of such application the treasurer was in default to the association, there being no representation to the contrary in the statements delivered, and nothing to show that at that time the fact was known to any officer of the association:

Supreme Council Catholic Knights of America v. *Fidelity & Casualty Co. of New York*, 63 Fed. Rep. 48.

Marine Insurance, Profit on Charter, Total Loss

The Queen's Bench Division, in a case tried before MATHEW, J., without a jury, *Asfar* v. *Blundell*, [1895] 2 Q. B. 196, has recently decided some questions of considerable importance with respect to marine insurance. A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were shipped on board under bills of lading, at freights, payable on right delivery, which in the aggregate exceeded the charter freight. The charterers then insured their "profit on charter" by a policy which contained a warranty against average. On the arrival of the ship, part of the cargo was delivered, and freight was accordingly payable under the bill of lading for that portion; but the residue, owing to sea damage, was in an unmerchantable condition, and freight was, therefore, not payable for it; the result being that the total amount of the freights payable under the bills of lading was less than the charter freight, and the charterer's profit was consequently lost. Under these circumstances, it was held that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty; and that the fact that the charter freight was a lump sum and not a tonnage rate could not avail the defendants, since it was not one which the assured were bound to disclose, the underwriters being put upon inquiry to ascertain the terms of the charter, the profit on which they purported to insure.

Intoxicating Liquors, Sale

The court just mentioned has also recently decided a very interesting case under the Licensing Act of 1872, (35 & 36 Vict. c. 94, § 3.) A brewer, who had a license for the sale of beer by retail, at a specified place, such beer to be consumed off the premises, was in the habit of sending round his cart containing jars of beer to houses in the neighborhood; the jars of beer were delivered from the cart at the customers' houses in pursuance of orders given by the customers at their houses to the carter in the previous week, the price being paid by the customer to the

carter in the week succeeding delivery. There was no mark on label upon the jars to show that any particular jar had been appropriated to any particular customer; and the court held that the sale of the beer must be taken to have been at the house of the customer and not at the licensed premises, and that the brewer was properly convicted of selling intoxicating liquor at a place where he was not authorized by his license to sell: *Pletts* v. *Campbell*, [1895] 2 Q. B. 229.

Justice of the Peace, Disqualification, Relationship

According to a late ruling of the Supreme Court of Alabama, the disqualifications declared by the Code of that state, § 647, which provides that no justice "must sit in any cause or proceeding in which he is . . . . related to either party within the fourth degree of consanguinity or affinity," are not exclusive of the disqualifications of the common law; and, therefore, a justice of the peace who married a first cousin of the defendant is incompetent to try the cause, when there are children of the marriage surviving, though the wife is dead: *Pegues* v. *Baker*, 17 So. Rep. 943.

Libel, Privileged Communication

A communication relating to state matters made by one officer of state to another in the course of his official duty is absolutely privileged, and cannot be made the subject of an action for libel: *Chatterton* v. *Secretary of State for India in Council*, (Court of Appeal of England,) [1895] 2 Q. B. 189.

The libel complained of in this case was made by the Secretary of State for India to the Parliamentary Under-Secretary for India in order to enable him to answer a question asked in the House of Commons with regard to the treatment of the plaintiff, an officer in the Indian Staff Corps, by the Indian military authorities and Government, and stated that the Commander-in-Chief in India and the Government of India, in a dispatch in the secretary's possession, recommended the removal of the plaintiff to the half-pay list as an officer whose retention on the effective list was in every way most undesirable. This statement the plaintiff alleged to be false.

Communications made by one officer to another, in the discharge of his duty, are privileged: *Pittard* v. *Oliver*, 63 L. T. N. S. 247; and an action for libel will not lie against the members of an investigating committee appointed by a town with which the plaintiff had a written contract, for defamatory matter contained in a printed report made by them to the town; for in making the report the committee is performing a duty imposed upon it, and is communicating to the voters and taxpayers of the town the results of an investigation in which they have an interest, and which they have the right to know and act upon, and the occasion is such as to protect the committee from a liability for such statements contained in the report as are made in good faith, without malice, and with reasonable cause to believe them true, and which do not go beyond what is fairly required of them in the discharge of their duty: *Howland* v. *Flood*, 160 Mass. 509; S. C., 36 N. E. Rep. 482. The same is true of any investigating committee: its report will not be actionable, without proof of express malice: *In re The Investigating Commission*, 16 R. I. 751.

Licenses, Junk Dealers

The regulation of pawnbrokers, junk dealers, and dealers in second-hand goods, is within the police power, and an ordinance requiring such dealers to take out a license, under certain restrictions, is not unreasonable, merely because it requires them to give a bond in addition to the payment of the license fee, provides that they shall keep a record of their purchases and sales, and to furnish a statement thereof to the police department, requires that their applications for license be signed by twelve freeholders certifying to the good character and reputation of the applicant, prohibits them from purchasing from boys, intoxicated persons, or habitual drunkards, and provides as a condition precedent to the issue of a license that the applicant shall agree that his license may be revoked at the will of the city council: *City of Grand Rapids* v. *Braudy*, (Supreme Court of Michigan,) 64 N. W. Rep. 29. A similar statute, requiring pawnbrokers to keep a record of things pawned, and submit to the inspection

of the police officials, on demand, was held constitutional by the Supreme Court of Missouri, in *City of St. Joseph* v. *Levin*, 31 S. W. Rep. 101. See 2 AM. L. REG. & REV. (N. S.) 439.

Master and Servant, Improper Use of Information Obtained during Service

The Court of Appeal of England, in *Robb* v. *Green*, [1895] 2 Q. B. 315, has affirmed the judgment of HAWKINS, J., in *Robb* v. *Green*, [1895] 2 Q. B. 1, (See 2 AM. L. REG. & REV. (N. S.) 497,) that it is an implied term of the contract of service that the servant will observe good faith towards his master during the existence of the confidential relation between them; and that when one who is employed as manager of his employer's business surreptitiously copies from his master's order-book a list of the names and addresses of the customers, with the intention of using it for the purpose of soliciting orders from them after he had left the plaintiff's service and set up a similar business on his own account, and does so use the list after the termination of the service, his conduct is a breach of that implied contract, and entitles the master to damages and an injunction against the use of the list.

Naturalization, Regulation, State Laws

The Supreme Court of New Jersey has just declared constitutional a statute passed by the legislature of that state during its last session, for the purpose of protecting the franchise from ignorant and unworthy foreigners, who have hitherto often been naturalized immediately preceding election in large blocks, through the instrumentality of party committees.

One of the provisions of the law denies to party committees or candidates the right to pay the fees of applicants for naturalization papers. Another provides that "no person shall hereafter be naturalized or admitted to be a citizen of the state within the next thirty days preceding any national, state, municipal, general, special, local or charter election."

It was on this provision that the constitutionality of the law was attacked and the opinion rendered. It was held that the state could not abridge the right of the would-be citizen to

secure his papers at any time. The opinion of the court was delivered by Justice VAN SYCKEL, who, with Justice LIPPINCOTT, sat in the case. The proceeding was on mandamus, brought by Senator Daly on behalf of one Albert Rushworth, who was denied naturalization papers by the Hudson County Court of Common Pleas. The refusal by the Hudson County court was on the sole ground that Rushworth had made his application within thirty days next preceding the election of municipal officers in West Hoboken. Judge VAN SYCKEL says:

"It is entirely settled that no state can pass naturalization laws. The United States statute provides for the naturalization of aliens by application to a Circuit or District Court of the United States, or a District Court or Supreme Court or Court of record of any of the states having common law jurisdiction and a seal and clerk. The United States government has thus selected the state courts as one of its agencies to hear and act upon applications for naturalization.

"The solution of the controversy in this case, in my judgment, turns upon the question whether the state may not regulate the order of business in its own courts in relation to this subject, or refuse altogether to permit its courts to entertain applications for naturalization.

"Whether the judges of the state courts shall act on applications for naturalization or execute any other like authority, with which they may be lawfully invested, is, in my opinion, exclusively within, and subject to, the will of the legislative branch of the state government.

"My conclusion is that it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and, therefore, it can lay any restraint, regulation, limitation or condition upon the practice in such cases, which it may deem expedient or proper.

"No right is claimed or could be conceded on behalf of the state to interfere in any respect with the subject of naturalization in the Federal courts. This in no wise impairs the exclusive power of the United States over the subject of naturalization. The power of Congress to create inferior courts and such other agencies as it may deem necessary for the com-

plete exercise of this branch of its exclusive authority is not circumscribed."

In Philadelphia, by rule of court, the Common Pleas will only hear applications for naturalization between the first day of each December and the first day of the following July. (Rule XXVII., § 119½.)

The Supreme Court of Louisiana has adopted the prevalent doctrine on the imputation of contributory negligence, holding, in *Perez* v. *New Orleans City & Lake R. R. Co.*, 17 So. Rep. 869, that a passenger in a tally-ho, hired with a driver from the proprietors of a livery stable, is not so far identified with the driver as to be responsible for his acts, and chargeable with his contributory negligence, so as to exonerate a third person whose concurrent negligence causes an injury to the passenger, unless the passenger undertakes the management and direction of the driver in some manner outside of merely indicating the route he is to travel and the destination to which he wishes to be taken; and the passenger is not himself guilty of contributory negligence because of a failure to advise the driver in regard to his manner of driving.

Negligence, Imputed

The pardon of one convicted of perjury will, in the opinion of the Supreme Court of Pennsylvania, remove the disability to testify created by the acts of that state of 1860, March 31; P. L. 382, § 14, which provides that any one convicted of that offence "shall be forever disqualified from being a witness in any matter in controversy," and 1887, May 23; P. L. 158, § 5, which provides that such person shall not be a competent witness for any purpose, though his sentence may have been fully complied with, "unless the judgment of conviction be judicially set aside or reversed:" *Dichl* v. *Rodgers*, 32 Atl. Rep. 424.

Pardon, Effect

The litigation over the validity of the Berliner telephone

patent has been decided, on appeal, in favor of the Bell Telephone Company, by the Circuit Court of Appeals, First Circuit, in *American Bell Telephone Co.* v. *United States*, 68 Fed. Rep. 542, reversing 65 Fed. Rep. 86. The ground on which it was sought to cancel the Berliner patent was the delay in procuring its issuance, which was alleged to have been illegal. This point, in connection with the evidence adduced, was very carefully examined by the Court of Appeals, and the following conclusions, fatal to the success of the bill, were arrived at: (1) If an applicant is under no legal obligation to prevent delays arising from the acts or omissions of the officials of the patent office, there is no rule of law by which it can be said that, because he may have received an incidental benefit therefrom in the prolongation of his monopoly, his purpose in not more vigorously pressing his application was unlawful; since the motive will not make an act wrongful, if it is not in itself wrongful; (2) That there is no rule of diligence which requires an applicant, on pain of forfeiting his rights, to do, in the interest of the public, all the things which he has a right to do, in his own interest, for the purpose of pressing his application to a speedy issue; (3) That when a bill is filed to cancel a patent on the ground that the patentee acquiesced in delays of the patent office whereby his monopoly was, in effect, prolonged, it is not for the court to say, under the circumstances of the case in hand, that he was not entitled to use his own judgment in regard to what unofficial methods he might take, or the persistency of his representations to the public officials for the purpose of speeding his application; (4) That the existence of an understanding between the patent office officials and an applicant that further action should abide the result of certain litigation involving the applicant's rights is no ground for forfeiting a patent subsequently granted, though the delay in effect operated to prolong the patentee's monopoly, when that understanding was the result of the honest and independent judgment of both parties that this course was, on the whole, the best, and consisted in nothing more than an interchange of these views; (5) That

Patents, Delay in Issuing, Fraud

an error of judgment on the part of the commissioner in delaying action upon an application pending certain litigation which involved the applicant's rights, and the acquiescence of the applicant in such delay, is no ground for forfeiting the patent when issued; (6) That if even it were true that, by reason of the special circumstances of this case, the applicant was under an extraordinary duty to the public to exercise the greatest possible diligence to move the officials of the patent office to speedy action, yet the burden rested upon the United States to prove that under some practical method or methods, not employed by the patentee, the action of the patent office would have been hastened; (7) That a patent should not be canceled merely upon the ground of imputed or legal fraud arising from the delay of the patent office, acquiesced in by the applicant, when there has been no deceit, collusion, or corruption; and (8) That the issuance of a second patent to the same person for the same invention, under circumstances such that it is not clearly manifest that the inventions are the same, and that there might be a reasonable difference of opinion on the question of identity, does not involve such an excess of power on the part of the commissioner as will justify a court of equity in canceling the second patent.

Peddlers

According to the Supreme Court of Errors of Connecticut, one who makes regular periodical trips through certain towns, as agent for a wholesale confectioner, with a wagon loaded with packages of candy, calling on retail dealers only, taking orders and filling them from the wagon if he can, if not, booking them to be filled by a subsequent delivery, is not a peddler, within the meaning of Pub. Acts Conn. 1893, May 18, c. 121, p. 271, entitled "An act concerning sales of merchandise by itinerant peddlers," which provides for licensing persons to engage in the business of an auctioneer, peddler, or hawker, or as a traveling itinerant purchaser of second-hand goods: *State* v. *Fetterer*, 32 Atl. Rep. 394.

A peddler, in the popular signification of the word, is "a small retail dealer, who, carrying his merchandise with him,

travels from house to house, or from place to place, either on foot or on horse-back, or in a vehicle drawn by one or more animals, exposing his goods for sale, and selling them:" *Randolph* v. *Yellowstone Kit*, 83 Ala. 474. "The distinctive feature does not consist in the *mode* of transportation, though one of the statutory modes is essential to constitute a peddler, but in the fact that a peddler goes from house to house, or place to place, carrying his articles of merchandise with him, and concurrently sells and delivers:" *Ballou* v. *State*, 87 Ala. 144. "The dominant idea involved in such an occupation seems to be that the individual carries his stock in trade, consisting of small wares, on foot, or in a vehicle, about the country, offering them for sale, and then and there selling them:" *Stamford* v. *Fisher*, 140 N. Y. 187; S. C., 35 N. E. Rep. 500, affirming 63 Hun, 163; S. C., 17 N. Y. Suppl. 609. There are, therefore, four elements required to constitute a peddler: First, that he should have no fixed place of dealing, but should travel around from place to place; Second, that he should carry with him the wares that he offers for sale, not merely samples thereof; Third, that he should sell them at the time when he offers them, not simply enter into an executory contract for future sale; and Fourth, that he should deliver them then and there, not merely contract to deliver them in the future. If any one of these elements is constantly absent from the regular dealings of the vendor, he is not a peddler, whatever else he may be. Accordingly, no one who merely solicits orders for future delivery, or sells by sample, whether a dealer, or simply the agent of a dealer, can be considered as a peddler.

1. A storekeeper, who solicits orders and delivers groceries pursuant to such orders, but does not sell or offer for sale any goods directly from his delivery wagon, is not a peddler: *Stamford* v. *Fisher*, 140 N. Y. 187; S. C., 35 N. E. Rep. 500, affirming 63 Hun, 163; S. C., 17 N. Y. Suppl. 609; *Commonwealth* v. *Horn*, 12 Pa. C. C. 284. A merchant tailor, who exhibits samples of cloth and takes orders for suits of clothing to be made and delivered afterwards, is a manufacturer, not a peddler: *Radebaugh* v. *Village of Plain*

City, 28 Wkly L. Bull. 107; and no merchant who has an established place of business, and simply takes orders to be filled at that place and delivered from there, is within the definition: *Commonwealth* v. *Eichenberg*, 140 Pa. 158; S. C., 21 Atl. Rep. 258.

2. One who sells ranges, &c., by sample, and by taking orders for goods to be thereafter delivered and paid for, is not a peddler: *State* v. *Lee*, 113 N. C. 681; S. C., 18 S. E. Rep. 713. When the defendant went from house to house displaying samples carried with him in a case, and taking orders for his firm, and the firm, if it approved the orders, shipped the goods to the defendant, who delivered them, and took the cash payment, with an obligation to the firm for the balance, which was collected by the firm, it was held that the defendant was not a peddler within the statute: *State* v. *Hoffman*, 50 Mo. App. 585; *In re Flinn*, 57 Fed. Rep. 496; *Olney* v. *Todd*, 47 Ill. App. 439. Canvassing or taking orders for books, pictures, &c., is not peddling or hawking: *Cerro Gordo* v. *Rawlings*, 135 Ill. 36; S. C., 25 N. E. Rep. 1006, affirming 32 Ill. App. 215; *Emmons* v. *Lewistown*, 132 Ill. 380; S. C., 24 N. E. Rep. 58. The driver of a delivery wagon, who simply takes orders for future delivery, and then delivers the goods previously ordered, is not a peddler: *Hewson* v. *Inhabitants of Township of Englewood*, 55 N. J. L. 522; S. C., 27 Atl. Rep. 904. Nor is one who merely delivers goods previously sold by another: *City of Stuart* v. *Cunningham*, 88 Iowa, 191; S. C., 55 N. W. Rep. 311. The only recent case in contradiction of these views is *Spanish Fork City* v. *Mortensen*, 7 Utah, 33, which is without weight, so far as this point is concerned.

3. But if the vendor does travel from place to place, selling his goods and delivering them on the spot, he is a peddler; and as the sale takes place wholly within the limits of the state, he cannot claim that he is engaged in interstate commerce: *Commonwealth* v. *Gardner*, 133 Pa. 284. When the evidence showed that the defendants, who were butchers, and kept a meat-shop, sent out a delivery wagon in charge of an employer with meat to be delivered to fill orders previously

given by their customers, but at the same time were accustomed to send out in the wagon other meat, with knives for cutting it, and scales for weighing it, and that the employe in charge of the wagon was accustomed to drive from place to place soliciting business, not only from the wagon, but by going from house to house when the inmates did not see him and come out to the street, and selling to such as desired to buy from him, cutting up the meat, and weighing it out from the wagon, it was held that this constituted peddling in the employers: *City of Duluth* v. *Krupp*, 46 Minn. 435; S. C., 49 N. W. Rep. 235. So, a manufacturer of and dealer in proprietary medicines, who has a permanent manufactory and residence in one county, upon which he pays taxes, but who, during certain seasons of the year, attends the county fairs for the purpose of advertising and introducing his medicines, and publicly recommends them as a cure for certain diseases, is an itinerant vendor: *Snyder* v. *Closson*, 84 Iowa, 184; *State* v. *Gouss*, 85 Iowa, 21.

Public Improvements, Assessment, Diagram

The Supreme Court of California, in *Labs* v. *Cooper*, 40 Pac. Rep. 1042, has lately held, that in a proceeding to collect assessments for street improvements, a recorded diagram, in which there is nothing to indicate the points of the compass, whereby an owner could determine, from an inspection of the diagram and assessment, where on the map his land was plotted, will not be sufficient to create a lien; and the fact that the lot may be identified by reference to the official map of the city will not cure the defect, when there is nothing in the record of the assessment referring to that map, since the court will not take judicial notice of the map, and the property owner is not chargeable with knowledge of it.

Relics, Municipal Control, Liberty Bell

Judge THAYER, of Philadelphia, has recently rebuked the officiousness of the worthy gentlemen who would have prevented the city from sending the Liberty Bell to the Atlanta Exposition, denying the injunction prayed for, and dismissing the bill. The most pointed part of his opinion is as follows:

"Independence Bell, or 'the Liberty Bell,' as it is commonly called from its revolutionary associations and the unconscious prophecy placed upon it when it was made, is the property of the city of Philadelphia, which acquired its title to it by a sale made by the Commonwealth in 1816 of the State House and all its grounds, buildings and appurtenances, including the bell, furniture and all other property belonging to the State House, the whole being purchased by the city for the sum of $70,000.

"The property of the city of Philadelphia in the Liberty Bell is as absolute and as untrammeled by conditions as is the title by which any individual holds his personal property. It is the property of the corporation, and entirely under its control—as much so as the equipments of the courts, or the furniture of the Council chambers. It has been said that the city is a trustee and holds the bell as trustee for the citizens of Philadelphia, and this is true in a certain sense; indeed in the same sense the city may be said to be a trustee for all the people of the United States, for it is a moral duty which it owes to the whole country to take care of and guard safely a relic of so much interest to all the people of the United States. But this is not such a trust as trammels or interferes in any way with its absolute ownership of the bell. It may not make an unlawful or fraudulent use of it, and against such a use a court of equity might enjoin it. But to warrant such an interference the use must plainly appear to be a fraudulent or unlawful use. City Councils might be enjoined from renting a room in the City Hall for a cow stable, for that would plainly be an unlawful use of the property. So they might, in a plain case, be enjoined, I apprehend, from making an unlawful disposition of the bell.

"But can the sending of the bell under proper conditions, and properly attended and guarded, as a Pennsylvania exhibit, to the Atlanta Exposition, be regarded in any sense as an unlawful or fraudulent act?—I use the word fraudulent in the sense of misapplication or misuse of public property.—In my judgment it is preposterous to say so. The exposition at Atlanta is an event of great importance, not only to our

brethren in Georgia and the South, but to the whole country. It was regarded by the Legislature of Pennsylvania of so much importance that at its recent session it appointed commissioners, and appropriated the sum of $38,000 to defray the expense of the Pennsylvania exhibit there. It will be participated in by most, if not all, the states, and it will be an event which can not but advance the interests of our common country, and draw closer and closer those bonds of fraternal union between the different states, which are so generally the offspring of extensive commercial intercourse.

"But this is not a question for the exercise of our discretion nor the discretion of any court, but for the discretion of the city of Philadelphia, the owner of the bell. So long as the disposition proposed to be made of it is not manifestly illegal, it is a matter absolutely within the discretion of the City Councils; and that the proposed use is not illegal I entertain no doubt whatever."

State Institutions, Trustees, Term of Office

When several persons are nominated by the governor and confirmed by the senate as members of the board of trustees of state charitable institutions, and the terms of the offices to be filled by the said appointment are not of the same duration, and do not begin and end at the same time, if the nominating message to the senate is indefinite and ambiguous as to the tenure and succession of the appointees, and does not show when the term of each appointee is intended to begin and end, the records in the offices of the governor and secretary of state in regard to such appointments, as well as the commissions issued to and accepted by the appointees, are competent evidence in determining the succession and terms of those appointed: *Lease* v. *Clark* (Supreme Court of Kansas), 40 Pac. Rep. 1002.

Writs, Service, Officer of Corporation

The Circuit Court for the Eastern District of Michigan, in *United States Graphite Co.* v. *Pacific Graphite Co.*, 68 Fed. Rep. 442, has recently extended the rule that an officer of a foreign corporation temporarily within the jurisdiction for purposes not connected with the business of the corporation, cannot be validly

served with process, and has held, that service of process made upon an officer of a foreign corporation, casually in the state where the service is made, but where such corporation has no place of business or agency, will not confer jurisdiction, although the officer was at the time engaged upon business of the corporation. This nullifies the decision of the state court in *Shickle, H. & H. Iron Co.* v. *Wiley Const. Co.*, 61 Mich. 226; S. C., 28 N. W. Rep. 77, where it was held that if the officer of the foreign corporation is within the jurisdiction, and served there, such service is valid to bind the corporation and subject it to the jurisdiction of the court, and the defense that the officer served was not on the business of the corporation cannot avail the defendant, so far as the extra-territorial effect of a judgment obtained on such service is concerned.

The rule mentioned above, that in a personal action against a foreign corporation, neither doing business within the state, nor having an agent or property therein, the service of a summons on its president, while temporarily within the jurisdiction, is not a sufficient service on the corporation, was announced by the Supreme Court of the United States, in *Goldey* v. *Morning News*, 156 U. S. 518; S. C., 15 Sup. Ct. Rep. 559, affirming 42 Fed. Rep. 112. The same was also held in *Fidelity Trust & Safety Vault Co.* v. *Mobile St. Ry. Co.*, 53 Fed. Rep. 850. The contrary was decided in *Gravely* v. *Southern Ice Machine Co.*, (La.), 16 So. Rep. 866.